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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1368

HAROLD KONIGSBERG,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

THE PETITIONER'S REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Reply—Jurisdiction

Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari in the instant matter to Saturday, March 28th, 1970. On March 26th, 1970, the petition was served by mail upon respondents and forwarded to the Office of the Clerk of this Honorable Court with appropriate fees and certificate of service on the assurance from the United States Post Office that there would be no difficulty in mail delivery by Saturday, March 28th, 1970, from New York City to Washington, D.C. The petition was filed on March 30th, 1970. The jurisdiction of this Court is respectfully invoked under 28 U.S.C. § 1254(1) and is not lost by the one-day delay (Pet.'s Appendix G, p. 26a).

Reply—Statement of the Case

In the Government's brief in opposition to the petition the following facts are recited which require judicial cognizance:

1. The Respondent claims that an informant who supplied information previously was reliable. The fact is that nowhere in the trial record or in the pre-trial suppression hearing is there any evidence to support such a conclusion. As a matter of fact the Trial Court precluded inquiry by defense counsel into that very question. Moreover, it is of paramount interest that the Government obtained a search warrant in the instant case and in the affidavit in support of same there was neither allusion nor mention of an informant. The informant developed for the first time at the pre-trial suppression hearing. In making the arrest and search it was the Government's claim that the Trial Court's ruling was based on *probable cause* and not the search warrant the FBI had gone to the effort of obtaining.

2. The Government creates the impression that an FBI agent "saw with the aid of street lights, several suits with white tags lying on the back seat" (Resp. 3) of a car which had emerged from the garage in question.[1] This automobile was in no way connected to the Petitioner and the inference created that the FBI had prior knowledge that the suits on the back seat were actually related to an interstate theft is no way supported by the trial evidence. The fact is that the determination was made after the arrest and not before.

3. The Government concedes in its opposition brief the most crucial fact in issue. Both the Trial Court and the

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[1] The garage was the place of the arrest and where the stolen property was found.

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United States Court of Appeals for the Third Circuit maintained that the Petitioner's alleged incriminatory statement was made during an *investigatory stage* and that therefore the right to counsel and self-incrimination did not attach. To so find it was necessary for the Trial Court and the Court of Appeals to rule that the Petitioner was not within the accusatory stage. The Court of Appeals in *United States* v. *Konigsberg,* 336 F.2d 844 (3rd Cir. 1964) at page 852, indicated:

> (when) "F.B.I. agents talked with Konigsberg the process was definitely investigative and never shifted to accusatory."

The Government on its re-examination of the record in the instant matter now concedes (Resp. 3-4):

> "The agents identified themselves as FBI men and announced that everyone then in the garage (which included petitioner) was under arrest. The search warrant was not executed; however, the clothing inside the garage was seized."

There can be no question over the fact that at the time the alleged admission was claimed the process was accusatory and that therefore Petitioner's Fifth and Sixth Amendment rights attached. It was only after the arrest and the subsequent seizure and examination of the clothing inside the garage was the determination made that the property was the actual subject matter of an interstate theft. Moreover, after the arrest, petitioner demanded counsel, petitioner was proferred rights to counsel by arresting officers, who then physically and violently restrained him from calling his attorney at FBI Headquaters when petitioner grabbed a telephone in frustration.

4. In the opposition brief, the Government creates the inference that petitioner's statement was spontaneous or a voluntary declaration during the course of a *chat* with FBI officers (Resp. 4).

> "He was then asked if he desired to explain his presence in the garage. Petitioner replied this was the only legitimate arrest the FBI ever made of him; there was one thing he didn't have, and that was stool pigeons, and his purpose in being in the garage was 'to help a fellow out'."

Even accepting the Government's contention, it is apparent that once under arrest and demand for counsel is made the subterfuge employed by the arresting officers of giving the Petitioner a chance to explain his presence was nothing less than *interrogation.*

Reply—Argument

Respondent maintains that Petitioner concedes that the District § 2255 Court made a thorough examination of the files and record of the case but only quarrels with the Court's conclusion after proper examination (Resp. 4-5). This of course is not the case at all. Petitioner indicated in his petition that *"it was District Court Judge Whipple's opinion . . ."* (Stress supplied) that an evidentiary hearing was unnecessary. This was not the view of the Petitioner who claimed (Pet. 12), "A hearing would have determined if Konigsberg was deliberately secreted from his then counsel. . . . Had District Court Judge Whipple in his Opinion-Order permitted a hearing the Petitioner would have more fully developed the facts of this delayed arraignment as reflecting upon the issue of voluntariness" (Pet. 12). Moreover the evidentiary hearing would have given Petitioner opportunity to establish his contentions relating to the testimony of FBI Agents Straub and Roetzel, the latter claiming that he took alternative turns in watching Petitioner at FBI—headquarters (Trial Rec. 346), with FBI Agent Straub, an inconsistency with the New Jersey District Court testimony which was *contra* to his New York Supreme Court evidence.

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1. Respondent argues that the purported "statements were elicited during casual conversation incidental to administrative tasks of fingerprinting and photographing; and that the nature of the statements fell far short of a confession and indeed were only potentially incriminating statements" (Resp 6). Unfortunately the Trial Court felt otherwise and ruled the admission *"a very incriminatory statement or statements"* (Stress Supplied, Trial Record, 868).

The Government cannot have it both ways. Either the Petitioner was not an "innocent novice" (Resp. 6) and therefore as a sophisticated criminal fully aware of the underworld guideline by the *mouth does the fish die* or he was in fact an "innocent novice" who was deluded into making the statements in question. The Government can not dispute that this conviction hangs by the thread of an incriminatory statement. The Government concedes that previous to the alleged statement, the Petitioner was (a) under arrest; (b) advised of his right to counsel; (c) Petitioner demanded counsel and was physically and violently restrained from calling his attorney and (d) that actual interrogation was underway under the guise of giving the Petitioner an opportunity to explain.[2]

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[2] Had Petitioner been permitted the telephone call certain FBI records of outgoing telephone calls on such an important issue would have reflected it and Petitioner's testimony to the contrary at the trial proper would have exposed him to a perjury charge. The Government therefore does not dispute this fact. In giving Konigsberg a chance to explain his presence in the garage we are to be deluded into believing that the FBI after going through an entire arrest procedure would permit Petitioner to leave unhindered. Such an argument is specious and is offensive to reason. It is curious that the FBI claimed to have fingerprinted Petitioner. Is this not the task of the United States Marshal previous to arraignment?

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The Court of Appeals and the Trial Court permitted the incriminatory statement into evidence on the basis that at the time petitioner was within the *investigatory process* and thus rights to counsel and against self-incrimination were not brought into interplay. The respected Court of Appeals for the Third Circuit in *Daley* v. *Yeager*, 415 F.2d 779 (1969), held at p. 783:

> "Once the prosecution has commenced, law enforcement officers may not secure concessions from an accused which circumvent the protections a lawyer might provide."

This same Circuit held in *Billingsley* v. *New Jersey*, 408 F.2d 1181 (3rd Cir. 1969), at page 1183:

> "We therefore conclude that the rule of Escobedo can only be invoked by a defendant who has requested and been denied counsel."

It is therefore clear that on the information available to it at the time the District Trial Court and the Court of Appeals in the consideration of the direct appeal ruled that when Petitioner made the statement in question the process was merely investigatory. In view and in the light of recent decisions and the newly acquired evidence as to the force and restraint used by the arresting officers against Petitioner in preventing him calling his attorney a fact-finding hearing is necessary in order to determine the total circumstances on the admissibility of the purported statement.

At no time did Petitioner waive his right to counsel having previously requested the assistance of an attorney. The Government agents offered Petitioner his right to counsel and then declined to make it possible for him to call a lawyer to his aid. As the record does not justify a waiver of counsel, it is clear that the FBI agents deliberately and in the absence of counsel engaged a frustrated

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Petitioner in a subtle form of interrogation claiming to afford him a chance to explain his presence in the garage. This was after physically and violently restraining him from calling the very attorney they claimed it was his constitutional perogative to call. The Trial Court and the Court of Appeals in direct review permitted the admission of the incriminatory statement into evidence and thus sustained the conviction by characterizing it as elicited during the investigatory stage. The most important demand for relief in this petition is for a § 2255 hearing in the District Court to enable Petitioner to develope all the circumstances under which the alleged statement was elicited. In this way the § 2255 Court will have an opportunity to hear all the evidence and make a fair determination of the facts in the light of existing and applicable law.

2. As one of the grounds for his § 2255 collateral attack on the conviction, Petitioner urged that during a pretrial suppression hearing the District Trial Court denied him standing to contest the legality of the search. The Government maintains (Resp. 7):

> "This argument overlooks the fact that the legality of the search of the garage and seizure of the clothing therein was fully litigated on petitioner's motion to suppress at trial and on direct appeal . . ."

The § 2255 Court, however, never reached the issue on the matter of merit but based its decision exclusively on the principle that a Fourth Amendment attack upon a conviction is not cognizable under collateral attack (Pet. 14a):

> ". . . it is settled in this circuit as in most other circuits that a claim of illegal search and seizure ordinarily may not be successfully raised in a proceeding which constitutes collateral attack on the sentence but must be presented in the appeal from the conviction. . . . This Court does not find any exceptional circumstances present to warrant an ex-

> ception to the general rule prohibiting collateral review. . . . Therefore, collateral review is not available either on the law or by way of an evidentiary hearing inasmuch as there has been no showing that this ground for relief is cognizable by collateral attack or that the previous failure in the Court of Appeals does not bar collateral relief."

The § 2255 Court therefore did not consider any other issue on the Petitioner's Fourth Amendment attack upon his conviction. In the affirmance of the § 2255 District Court opinion, the United States Court of Appeals considered *Kaufman* v. *United States,* 394 U.S. 217 (1969), which the District Court did not since this Court had not rendered its decision in that litigation at the time. The Third Circuit added that in any event there was a pre-trial suppression hearing and even though Petitioner was adjudged not to have standing the Government's search was held to have been valid in any event (Pet. 22a).

Petitioner reiterates the posture adopted in his Petition in that he must first have standing to attack an unconstitutional search against him *before* he can reach the merits of his contentions. The Government maintains that the search was justified but that in any event the Petitioner had no standing to attack it and no standing now to challenge it in a § 2255 proceeding.

An evidentiary hearing on this matter would have permitted Petitioner to establish standing and if this contention were favorably ruled he would then have been in a position to successfully show independent and interplay violations of his rights under the Fourth and Sixth Amendments.[3]

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[3] The Respondent herein invites inquiry into what facts the Petitioner would have brought to the attention of the § 2255 Court that were not fully litigated before the Trial Court. What

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3. A third contention raised by Petitioner was the denial of a *Jackson* v. *Denno,* 378 U.S. 368 (1964) hearing. The Government in dismissing Petitioner's contention (Resp. 9):

> "Collateral attack of the sentence on this ground is warranted only if petitioner can demonstrate that the trial court and the court of appeals erred in deciding that the incriminating statements did not fall within the purview of the *Escobedo* decision."

Petitioner was entitled to an independent inquiry outside the presence of the jury during the course of his trial on the issue of voluntariness. It was the duty of the Trial Court to adequately pass upon this issue before submitting it to the jury. For this purpose an adequate procedure was required. Petitioner's counsel at trial asked for such a hearing (R. 845). The Trial Court agreed that it should make such a determination outside the presence of the jury (R. 868). The flaws in the procedure adopted by the Trial Court prevented a due process determination on the issue of voluntariness. The jury had already begun to hear the testimony of FBI Agent Straub when the Court interrupted and continued it outside the presence of the jury. However, the Court did not provide for a procedure in which all witnesses including the petitioner-defendant and other defense witnesses could be heard at this hearing so as to enable it to consider a *totality of circumstances* governing this *"very incriminatory statement or statements"* (Shaw, *J;* R. 868). Instead, the Court permitted Straub

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is not before this Court in factual detail and which would be brought to light in an evidentiary hearing is that Petitioner was never informed of a suppression hearing, was never present at the suppression hearing, was never told to be at a suppression hearing, was never consulted about the suppression hearing, and was not present at this stage of the most crucial proceeding in the entire case since the conviction finally obtained by the Government involved a crime of possession. The Petitioner cannot reach the issue of merit until the issue of standing has been fully litigated and his opportunity to be heard established.

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to continue his testimony before the Court and later to resume his testimony where he left off before the jury. Furthermore other witnesses testified to the statements in question in the jury's presence previous to an initial determination by the Court. It is significant that Roetzel, an FBI agent, testified that he was not present at all times when Konigsberg was in custody but took turns with FBI Agent Straub. Roetzel's testimony was not cumulative of Straub for it was his evidence that he took turns with Straub in watching and/or handling Petitioner. It was therefore necessary for Petitioner to inquire from Roetzel outside the presence of the jury what effect his own conduct had on the issue of voluntariness.

Once again the Government indicates that in view of the fact that Petitioner's claim as to the statement was considered under *Escobedo* it need not now be subject to *Jackson*.

The Government does not dispute the inadequacy of the Court's attempt to satisfy a *Jackson* hearing. It disputes that Petitioner's statement was actually incriminatory taking exception with the opinion of the Trial Court and its own position at trial. The fact is Petitioner argues for a hearing under *Jackson* in which he can develop the totality of circumstances involving all case law applicable to his contentions on the issue of voluntariness.

CONCLUSION

The petitioner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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Member of the Bar of the
Supreme Court of the United States,
Attorney for Petitioner.

May 12, 1970.

APPENDIX G

(Telegram to Clerk of the United States Supreme Court)

Clerk of the
Supreme Court of the U.S.A.
Washington, D.C.

May 10, 1970

REFERENCE PETITION CERTIORARI 1368 OCT 1969 REPLY PETITIONER WILL BE FORWARDED MAY 12th STOP RESPECTFULLY DRAW YOUR ATTENTION EXTENSION FOR FILING PETITION TO SATURDAY MARCH 28 WHICH WAS MAILED NEW YORK CITY THURSDAY MARCH 26 ON ASSURANCE U.S. POST OFFICE TIMELY DELIVERY SATURDAY MARCH 28. PETITION NOT FILED UNTIL MONDAY, MARCH 30, 1970, SINCERELY REGRET ONE-DAY WEEK-END DELAY.

Sender's Tel. No. 522-0760

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